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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

September 23, 1996

Mr. William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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Re: Reply Comments, CC Docket No. 96-152

Dear Mr. Caton:

Please accept the enclosed original and eleven copies of Reply Comments of the Association of Telemessaging Services International (ATSI) as timely filed in the proceeding, FCC 96-310, CC Docket No. 96-152. Please communicate with ATSI regulatory counsel Frank Moore if these are not acceptable. Additional copies have been delivered to Janice Myles of the Common Carrier Bureau and the International Transcription Services.

Sincerely,

Herta Tucker
Executive Vice President

cc: International Transcription Services, Inc.
2100 M Street, N.W., Suite 140

Janice Myles (1 copy plus diskette)
Common Carrier Bureau
1919 M Street, N.W., Room 544

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Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996:)
)
Telemessaging,)
Electronic Publishing, and)
Alarm Monitoring Services)

CC Docket No. 96-152

**Reply Comments of the Association of
Telemessaging Services International**

**ASSOCIATION OF TELEMESSAGING
SERVICES INTERNATIONAL (ATSI)**

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Summary of Reply Comments

As discussed in more detail below, various commenters would render Section 260 meaningless by urging the Commission: 1) to undertake no steps to enhance safeguards against conduct now absolutely prohibited under Section 260(a); and 2) create a complaint procedure under Section 260(b) with features functionally indistinguishable from existing procedures already available to telemessagers.

ATSI reiterates the following points made in its comments filed in this proceeding:

- The statutory language of Section 260 of the Telecommunications Act of 1996 is clear and unambiguous. Section 260(a) creates a prohibition against anticompetitive conduct on the part of local exchange carriers (LECs) and Section 260(b) creates a procedure through which telemessagers may seek expedited relief from such conduct.
- Congress has recognized that LECs have the potential to gain unfair and anticompetitive market advantages that must be prohibited in order to achieve the goals of the 1996 Act. Section 260(a) creates an absolute prohibition against: 1) the direct or indirect subsidization of any telemessaging operation on the part of a LEC; and 2) preferential or discriminatory treatment on the part of the LEC in favor of its own telemessaging operations. The Commission must implement safeguards that will prevent the occurrence of this prohibited conduct and recognize that any violation of these safeguards represents a *prima facie* claim eligible for Section 260(b) relief.
- Section 260(b) provides an expedited complaint process through which telemessagers may bring to the attention of the Commission any conduct or practices that violate these prohibitions or any circumstances that result from such conduct or practices. The Commission is authorized to provide immediate relief from any violations of prohibited conduct and is further authorized to utilize Section 260(b) to develop additional safeguards against prohibited conduct and patterns of practice

- Section 260(c) defines the telecommunications services covered by Sections 260(a) and (b) and gives telemessaging a broad definition that includes: 1) *live* person-to-person recording, transcription and relaying; 2) *automated* mail, retrieval and storage; and 3) *all ancillary* services offered in combination with these services. These ancillary services, as with the primary services, are ever changing with technology development and consumer demands and expectations and therefore must not be confined within a static list of products and services. Opportunities often present themselves from unexpected customer inquiries and small businesses must be able to respond quickly and with innovation in order to remain competitive.

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**Reply Comments of the Association of
Telemessaging Services International**

Statement of Interest

The Association of Telemessaging Services International (ATSI) represents Enhanced Service Providers (ESPs) who offer, first and foremost, *live*, "person-to-person" answering services to the communications customer. ATSI also represents ESPs who offer *automated* telemessaging services. Telemessagers provide opportunities for call completion for their customers and offer options of voice messaging services, paging activation, as well as order taking and information exchange. Telemessagers address the special, personalized needs of the communications customer by providing *value-added services* to those services available from the LEC.

In order to establish effective safeguards against anticompetitive practices involving or resulting in subsidization of or preferential treatment in favor of telemessaging services offered by the LEC, ATSI supported passage of Section 260(a). Section 260(a) identifies the practices and activities that are now prohibited *without exception* and gives the Commission the authority to establish safeguards to prevent their occurrence. In order to provide an effective and expedient pathway to provide relief from and establish proscriptions against this type of conduct, ATSI supported passage of Section 260(b). Section 260(b) provides the pathway through which telemessagers may bring to the attention of the Commission any violations of the prohibited activity and seek timely relief and remedies.

Reply Comments

- I. **Section 260 applies to *all* LECs, *all* telemessaging services and operations (including live and automated services), *all* practices and activities that involve or result in subsidies and preferences, and operates in *all* markets, both intra- and interLATA.**

Section 260 applies to *all* LECs, *all* telemessaging services and operations (including live, automated and ancillary services), *all* practices and activities that involve or result in subsidies and preferences, and operates in *all* markets, both intra- and interLATA. Congress has purposefully given Section 260(a) this broad application, and the Commission must not develop rules that will limit the section's scope or practical applicability.

Section 260(b) is intended to provide telemessagers with an efficient and expedient pathway to relief from prohibited conduct and practices, and the Commission must not develop costly or

time consuming rules of procedure or evidence that will undermine the ability of telemessagers to make an immediate appeal to the Commission. Section 260(b) should be available to telemessagers and their representative organizations, like ATSI, who seek relief from specific practices on a case-by-case basis as well as for relief from patterns of practice engaged in by one or more than one LEC. Section 260(b) must not be turned into the practical equivalent of procedures already available. Congress included this special pathway for relief from anticompetitive behavior on the part of LECs and commenters can not now argue that these are not in fact needed.

- A. Section 260(a) creates an absolute prohibition against subsidization of telemessaging services on the part of the LEC and discriminatory and preferential treatment of LEC telemessaging services, and the Commission must establish and maintain safeguards to prevent conduct and behavior that violates this prohibition.**

In their comments, incumbent network owners argue that Section 260 imposes no greater obligations on LECs providing telemessaging services than exist under Sections 201 and 202 and that no new requirements are needed to implement the section. *See Pacific Telesis Group*, page 24. These entities would prefer to maintain the anti-competitive landscape that existed prior to the passage of the 1996 Act and avoid the more rigorous safeguards against anticompetitive conduct on the part of network owners that are now authorized by the 1996 Act. The Commission must reject these and all other arguments that Section 260 requires no new effort on the part of the Commission and therefore requires no additional safeguards.

One commenter suggests that Section 260 requires no additional rules or safeguards because the language is sufficiently clear, that Congress intended Section 260 to stand in the stead of pervasive government regulation, and that the Commission should decline to take any action under Section 260 unless necessary to resolve ambiguities. *See* SBC Communications, Inc., pages 1 to 3. A second commenter suggests that nothing more than Computer III and ONA are needed at the moment, while others suggest that Section 260 supplants any need for the continued application of Computer III or ONA. *See* Pacific Telesis Group, page 24; U.S. West, page 30; and SBC Communications, Inc., page 3.

These various attempts to limit the application of Section 260 or render meaningless its inclusion in the 1996 Act must be rejected outright. Whatever these commenters might have argued during debate and passage of the 1996 Act may not now be achieved by arguing the provision in question was not actually needed in the first place. Congress recognized the need to strengthen safeguards for telemessagers and did so with full awareness of the safeguards already in place. Because Congress has imposed such an unambiguous prohibition against internal subsidies and preferential treatment, the Commission has the responsibility to seek out all instances of unfair treatment and all circumstances where such conduct may take place and establish safeguards against their occurrence. Section 260 requires the Commission to develop safeguards to prevent the conduct clearly and specifically prohibited.

One commenter argues that Section 260 should not apply to non-BOC LECs or that Computer III and ONA should not apply to small or medium sized LECs. *See* Cincinnati Bell, page 3. Nothing in Section 260 suggests an exemption for non-BOC LECs, nor would Section 260 interfere with the applicability of Computer III or ONA.

B. Section 260 applies to both intraLATA and interLATA telemessaging services.

Several commenters have responded to the Commission's query regarding the applicability of the separate affiliate requirements under Section 272 and that section's interplay with Section 260. In its comments filed in this proceeding, ATSI stated that the Commission need not engage in such an elaborate effort to interpret Section 260 or its interaction with other provisions of the Act. The 1996 Act creates an absolute prohibition against the specific subsidies and preferences stated in Section 260(a).

One commenter argues that neither intraLATA nor interLATA telemessaging need be offered through a separate affiliate. *See BellSouth*, page 3. Another argues that "enhanced services that involve exclusive intrastate communications, or any segregable intrastate portions of mixed jurisdictional services, are subject to state authority". *See Bell Atlantic*, page 2. A third argues that an information services "offered on a stand-alone basis, without an integrated intraLATA transmission component [is] fundamentally intraLATA or local in nature, even if the service can be accessed by the end user from another LATA". *See U.S. West*, page 28.

BellSouth argues that "reliance on the overbroad jurisdictional claims under Sections 271 and 272 from the *BOC In-Region NPRM* as the predicate for extending the Commission's reach to all intrastate telemessaging services under Section 260 becomes bootstrapping in the extreme". *See BellSouth*, page 5.

Were the Commission to accept these arguments, the applicability of Section 260 and its intended value to telemessagers would be rendered non-existent. These arguments might have

been made during the debate and passage of the 1996 Act; however, this proceeding must not become forums to second guess Congress and attempt to determine what elements of Section 260 will be implemented and what elements need not be implemented.

ATSI members compete with the incumbent network owner in the provision of services on an intraLATA basis and, therefore, the protective prohibitions and remedies of Section 260 are applicable to intraLATA operations in order to have any practical impact for telemessagers.

Any limitation of the applicability of Section 260 will undermine its intended protective scope and remedial strength. Because ATSI members provide telemessaging services almost entirely on an intraLATA basis, any attempt to limit Section 260 to interLATA services would deny these providers of telemessaging of its intended remedy.

II. Section 260(b) creates a new pathway for telemessagers seeking relief from the conduct and behavior proscribed under Section 260(a) and other anticompetitive conduct engaged in by local exchange carriers.

The Commission asked for comments touching on standards to be applied in a Section 260 proceeding, including evidentiary standards and appropriate placement of a burden of proof. The Commission also has asked for comments regarding appropriate definitions for the statutory terminology of “materiality of financial harm” and “appropriate showing”. Incumbent network owners argue that Section 260 provides a pathway to relief that is essentially no different from that which is already available. One has argued that because Congress has selected procedural and substantive matters to advance the pro-competitive goals of the Act, the Commission need

do nothing to implement or secure outcomes that in fact achieve these goals and that well-established rules of procedure should be applied to Section 260. *See* SBC Communications, Inc., pages 24 and 25.

The Commission must consider how any and all rules developed for Section 260 proceedings will effect the ability of a telemessenger to: 1) bring a complaint immediately to the attention of the Commission; 2) demonstrate in a single pleading that circumstances exist that could result from prohibited conduct and behavior; and 3) achieve relief from prohibited activity that the Commission determines has taken place based on its inquiry initiated by the complainant. The Commission must be guided by the practical effect of its rules (or the lack of rules) in its implementation of the Act. Reliance on "well-established" principals render Section 260 proceedings are hollow if these same principals have provided no relief in the past. A rational reading of the statute make clear Congress' intent to move beyond these for purposes of accomplishing the pro-competitive goals of the Act.

- A. Evidentiary standards established for Section 260 must not have the practical effect of undermining the section's goal of providing expedited relief and a Section 260 *prima facie* case is made when the complainant offers facts that could result from prohibited conduct and behavior.**

One commenter argues that the Commission should not disturb well-established legal and evidentiary standards and that "a *prima facie* case requires proof either that the local exchange carrier is subsidizing its telemessaging service from its telephone exchange service or exchange access, or that the local exchange carrier is preferring or discriminating in favor of its telemessaging service operations in the course of its provision of telemessaging services". *See*

SBC Communications, Inc., page 23. Another argues that standards should require a complete showing of the activity complained of and that the Commission need not attempt to define a *prima facie* case. See Pacific Telesis Group, page 31.

Prior to passage of the 1996 Act, telemessagers were afforded opportunities to challenge anti-competitive and discriminatory behavior on the part of incumbents at the Commission and on the state level. For example, the Commission maintains procedures for bringing formal complaints which remain available to telemessagers; however, these have been and continue to be inadequate in many cases for purposes of addressing the discriminatory conduct that can and has been engaged in by incumbents. Congress chose to provide a more appropriate pathway to relief for telemessagers given the importance of timely opportunities to access the network and utilization of its functions and features.

Section 260 will provide a mechanism not available before passage of the 1996 Act to seek relief from prohibited practices as and when they do occur. The complainant therefore need only bring to the attention of the Commission facts or circumstances that could result from prohibited conduct. For example, a telemessager need only show that a request for access to the incumbent's network has been made and that interconnection has not been accomplished, or unbundled network functions or features have not been made available, or that cost or quality differentials exist between the LEC's own telemessaging operations and those offered by the complainant.

In the development of any and all rules governing Section 260 procedures, the Commission must preserve the goal of providing telemessagers an efficient and expedient pathway for relief from prohibited practices on the part of LECs. Furthermore, no rules should have the practical effect

of requiring telemessagers to undertake costly and time consuming preparatory work before being allowed to file a complaint with the Commission. No rule should impose a burden on telemessagers that interfere with their ability to immediately respond to a violation of Section 260.

B. The burden of proof remains at all times on the network owner by virtue of its control of information that will prove or disprove the facts alleged by the complainant.

One commenter argues that the burden of proof should not be shifted simply to achieve the expedited nature of the procedure anticipated under Section 260. *See Pacific Telesis Group*, page 31.

Telemessagers need only state facts, which if true, could be the result of prohibited conduct. As a general principal, the burden of proof begins and remains on the LEC. The LEC will control and have custody of the information that will allow the Commission to resolve any issue or issues raised in a Section 260(b) complaint. This is very often the same information that would be required in order for the complainant to meet higher evidentiary standards that are inappropriate under Section 260(b). It is in fact the ownership and control over the network that provides the LEC network owner the ability to engage in prohibited and anticompetitive conduct to begin with and the complainant should not be expected to access information that will provide the Commission with the information and facts necessary to render a determination of the complaint raised. The Commission, not the complainant, is in the unique position to access the information necessary to determine the validity of the complaint.

C. Material financial harm is always realized when a telemessenger is unable to access the network or utilize its functions or features or when a telemessenger is unable to offer services competitive in both price and quality.

Denial of access of the LEC's network or delay in responding to request for access by a telemessenger will always result in material financial harm. Material financial harm need not be demonstrated by actual dollars lost. Many instances of the harm realized by telemessengers as ESPs will be in lost opportunities resulting from prolonged negotiations for network access or delayed access to CPNI. Because telemessengers are unable to offer their services without access to the network, the timing of access is as important as the desired outcome of access and utilization of the network. Likewise, the ability to offer a seamless telecommunications experience for the customer is important and the inability to do so represents material financial harm to telemessengers.

ATSI agrees with the Alarm Industry Communications Committee that discrimination can result in "prospective harm that is virtually impossible to quantify" and therefore material financial harm includes non-quantifiable as well as quantifiable harm. *See* AICC, page 32.

Some commenters have argued that materiality must be determined on a case-by-case basis. *See* SBC Communications, Inc., page 26 and Bell Atlantic, page 16. ATSI has no objection to a case-by-case approach; however, the Commission must recognize that the inability of a telemessenger to access the network in a timely manner always results in material financial harm, as does the discriminatory pricing that will result from internal subsidizing prohibited under Section 260(a). The Commission must not adopt a "case-by-case" approach that ignores this reality or that results in creating unnecessary pre-proceeding deliberations.

Likewise, one commenter argues that that harm must threaten business viability before it qualifies as material. *See Pacific Telesis Group*, page 31 and 32. Again, the Commission must recognize the essential role that access, pricing and timing play in the delivery of telemessaging services. The inability to access the network in a timely manner or the inability to offer competitively priced services compared to those offered by the LEC always threatens the business viability of a telemessenger.

D. A statement of facts which if true violate the prohibitions of Section 260(a) will represent an appropriate showing for purposes of authorizing an order to cease if the Commission determines that they are more likely than not to have occurred.

One commenter argues that an appropriate showing for purposes of authorizing the Commission to issue an order to cease engaging in the activity must include “ a detailed showing of irreparable harm with a substantive likelihood of success on the merits. *See SBC Communications , Inc.*, page 27. Such standards applicable in judicial settings are inappropriate for SEction 260. Telemessagers currently have access to judicial proceedings, but Section 260 was not intended to mirror these or any other proceedings that already exist.

Section 260 requires the Commission, upon an “appropriate showing”, to order the LEC and affiliate where appropriate to cease in engaging in the identified activity until the final outcome is determined. An appropriate showing regarding network access issues will be a statement that a request has been made for interconnection, collocation or access to unbundled network elements and that such a request has been denied or a response to such a request has not been forthcoming or has been unduly prolonged. In all cases, an appropriate showing has been made where the complainant demonstrates that an attempt has been made and the result has not been

accomplished. A complaint that likewise shows a pattern of practice (where the conduct has occurred on more than one occasion and will continue to occur) that violates Section 260(a) prohibitions should also trigger the 60-day cessation order.

Conclusion

Section 260 is intended to protect these telemessagers against anticompetitive subsidization and discriminatory practices on the part of LECs. Section 260 represents the broadest of safeguards now available to telemessagers, not to be supplanted by existing rules or other provisions of the Act. Section 260 prohibits *all* LECs from engaging in *all* anticompetitive activities that involve or result in subsidies for their own telemessaging operations, or preferences and discrimination in favor of their own telemessaging operations, in *all* telecommunications markets.

Section 260 makes no distinction between intraLATA and interLATA and therefore the Commission must conclude that Section 260 applies to both intraLATA and interLATA services. ATSI members provide their telemessaging services almost exclusively on an intraLATA basis and Section 260 has meaning for telemessagers only if it is given applicability as intended to intraLATA as well as interLATA services. Based on the plain language of the statute, LECs are *absolutely* prohibited from subsidizing their telemessaging services, directly or indirectly, from their telephone exchange service or their exchange access. LECs are further *absolutely* prohibited from preferring or discriminating in favor of their telemessaging service operations in their provision of any and all telecommunications services.

The Commission need not engage in inquiries as to what circumstances these prohibitions may or may not apply because the statute entertains no such exceptions. All LECs and all telemessaging services offered by LECs are subject to the prohibitions of Section 260(a) and to the expedited procedures of Section 260(b). Any reduction in scope or application would be contrary to the intent of Congress in passage of Section 260 and interfere with the pro-competitive goals of the Act.

Finally, telemessagers may seek relief and remedies under Section 260(b) for specific, case-by-case practices prohibited under Section 260(a) as well as relief and remedies for patterns of practice that involve or result in the prohibitions of Section 260(a).

ATSI urges the Commission to develop rules for Sections 260(a) and (b) that give the full force and effect of the provision's intended role in securing a fair and competitive environment for telemessaging ESPs. The statutory language of Section 260 provides no basis for limiting its scope or application, and any attempts to do so are inconsistent with congressional intent and the Act's pro-competitive goals.

Respectfully submitted,

ASSOCIATION OF TELEMESSAGING
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